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Supreme Court, U.S.
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CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

COOPER TIRE & RUBBER COMPANY,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

Cooper Tire & Rubber Company ("Cooper") petitioned the U.S. Court of Appeals for the Fifth Circuit for review of an order of the National Labor Relations Board (the "Board" or "NLRB"), finding that Cooper had violated the National Labor Relations Act by, *inter alia*, promulgating and enforcing an overly broad no-solicitation rule and by suspending, then discharging, employee Mitzi Rye for engaging in union solicitation in work areas at times when either she, or the employee whom she solicited, should have been working. The Board cross-petitioned for enforcement of its Order. On review, the Fifth Circuit upheld the Board's decision, finding the rule overly broad, but refused to enforce that part of the NLRB's Order requiring Cooper to rescind its no-solicitation rule in its entirety and held that Cooper was entitled to enforce its no-solicitation rule when either the solicitor or the solicitee should be working. The Fifth Circuit granted enforcement, however, to that part of the Board's Order that required Cooper to reinstate employee Mitzi Rye with back pay.

1. WHETHER AN EMPLOYEE WHO ENGAGES IN UNION SOLICITATION AT A TIME WHEN EITHER THE SOLICITOR OR THE SOLICITEE SHOULD BE WORKING IS ENGAGED IN ACTIVITY THAT IS UNPROTECTED BY THE NATIONAL LABOR RELATIONS ACT; AND

2. WHETHER THE BOARD'S *DAYLIN* DOCTRINE, FIRST ANNOUNCED IN *DAYLIN, INC.*, 198

NLRB 281 (1972), ENFORCED ON OTHER GROUNDS, 496 F.2D 484 (6TH CIR. 1973), RELIED UPON BY THE NLRB IN ITS DECISION IN THIS CASE AND IMPLICITLY ADOPTED BY THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT IN ITS DECISION IN THIS CASE, IMPERMISSIBLY EXTENDS THE PROTECTION OF THE NATIONAL LABOR RELATIONS ACT TO EMPLOYEES WHO ARE ENGAGED IN UNPROTECTED ACTIVITY, I.E., SOLICITING FOR A UNION AT TIMES WHEN THE SOLICITOR OR THE SOLICITEE SHOULD BE WORKING; AND

3. WHETHER THE NATIONAL LABOR RELATIONS BOARD HAD THE AUTHORITY TO ORDER COOPER TIRE & RUBBER COMPANY TO REINSTATE EMPLOYEE MITZI RYE WITH BACK PAY WHEN SHE WAS DISCHARGED FOR ENGAGING IN UNPROTECTED ACTIVITY, I.E., SOLICITING FOR A UNION AT TIMES WHEN EITHER SHE OR THE EMPLOYEE SOLICITED SHOULD HAVE BEEN WORKING.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Petitioner Cooper Tire & Rubber Company ("Cooper")[1] respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit which is reported at 957 F.2d 1245 (5th Cir. 1992) and reprinted in the

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[1] Cooper Tire & Rubber Company is a publicly-held corporation with its headquarters located in Findlay, Ohio. Cooper owns and operates a plant in Tupelo, Mississippi, within the jurisdictional boundaries of the Fifth Circuit. Pursuant to Rules 14.1(b) and 29.1 of this Court's rules, Cooper states that there is no parent or subsidiary company of Cooper to be listed in this petition.

Appendix at Pages A(1)-(27). The Decision and Order of the National Labor Relations Board which was reviewed and enforced as modified by the Fifth Circuit is reported at 299 NLRB No. 145 (1990) and is reprinted in the Appendix at Pages A(43)-(110). Due to its length the Appendix has been submitted as a separate volume.

JURISDICTION

On April 8, 1992, the Fifth Circuit rendered its opinion, which is the subject of the instant petition for review. *See* App. pp. A(1) - (27). Judgment was entered by the Fifth Circuit and an order issued adopting the Board's judgment entry on June 1, 1992. *See* App. pp. A(28) - (40). Cooper filed a timely petition for rehearing as well as a suggestion for rehearing *en banc*. Both were denied by Order entered on July 8, 1992. *See* App. pp. A(41) - (42).

The Fifth Circuit had jurisdiction to review the Board's Order pursuant to 29 U.S.C. §§160(e) and (f). This Court has jurisdiction to review the Fifth Circuit judgment in question by writ of certiorari pursuant to 29 U.S.C. §§160(e) and (f) and 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutes involved in this case are cited below and reproduced verbatim in the Appendix at A(111) - (117) due to their length, pursuant to Rule 14.1(f) of this Court's rules.

1. *29 U.S.C. §157.* [Section 7 of the National Labor Relations Act]

2. *29 U.S.C. §158(a)(1).* [Section 8(a)(1) of the National Labor Relations Act]

3. *29 U.S.C. §158(a)(3).* [Section 8(a)(3) of the National Labor Relations Act]

4. *29 U.S.C. §160(a).* [Section 10(a) of the National Labor Relations Act]

5. *29 U.S.C. §160(c).* [Section 10(c) of the National Labor Relations Act]

6. *29 U.S.C. §160(e).* [Section 10(e) of the National Labor Relations Act]

7. *29 U.S.C. §160(f).* [Section 10(f) of the National Labor Relations Act]

STATEMENT OF THE CASE

The Regional Director for Region 26 of the National Labor Relations Board issued a series of complaints against Cooper Tire & Rubber Company ("Cooper") at its Tupelo, Mississippi plant based upon charges filed by the United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO (the "Union" or the

"URW").[2] A hearing was held before an Administrative Law Judge (the "ALJ") and, on August 31, 1989, the ALJ issued his recommended Decision and Order dismissing certain of the allegations but finding that Cooper had violated the National Labor Relations Act, 29 U.S.C. §§158(a)(1) and (a)(3) (the "Act") in other areas. Cooper filed exceptions to the ALJ's Decision. On September 27, 1990, the Board issued its Decision affirming the ALJ's rulings and findings, with minor exceptions that did not affect the validity of the ALJ's Decision.

The Board found that Cooper had violated §§8(a)(1) and 8(a)(3) of the National Labor Relations Act by unlawfully (1) maintaining and enforcing an invalid no-solicitation rule and (2) suspending and then discharging Mitzi Rye for engaging in union solicitation in violation of the no-solicitation rule because *inter alia*, the rule was invalid. The Board had ordered Cooper to rescind its no-solicitation policy in its entirety. The no-solicitation policy at issue provided:

> No Cooper employee should be permitted to distribute any printed matter or solicit on behalf of any group or organization during *working time* or in any *working area*. (Emphasis added by the Fifth Circuit.)

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[2] Although the URW filed the underlying unfair labor practice charges in this case, the URW did not intervene in the review proceedings before the Fifth Circuit. Accordingly, pursuant to Rule 14.1(b) of the Rules of the Supreme Court, the sole parties to the proceedings are those whose names appear in the caption of the case.

> Solicitation or distribution of printed matter by Cooper employees will be permitted only during non-working time and in non-working areas.

Cooper timely filed a petition for review of the decision of the Board with the U.S. Court of Appeals for the Fifth Circuit, pursuant to 29 U.S.C. §160(f). The NLRB filed a cross-application for enforcement pursuant to 29 U.S.C. §160(e). On April 8, 1992, the Court issued its opinion, reversing the Board on certain issues but enforcing the Board's order as modified. The Court entered an order adopting the Board's proposed judgment entry on June 1, 1992. Cooper timely filed a petition for rehearing, which was denied on July 8, 1992.

The only part of the Fifth Circuit's decision, which is the subject of the instant petition for writ of certiorari, is that part of the Court's decision which found, in agreement with the National Labor Relations Board, that Cooper unlawfully suspended, then discharged, employee Mitzi Rye for engaging in union solicitation in work areas at time when either she or the employee solicited should have been working.

In considering the validity of Cooper's no-solicitation rule, the Fifth Circuit agreed with the Board that part of the rule was invalid, finding evidence that the policy prohibited union solicitation in certain break areas while employees were on break. [App. p. A(9)].[3] The Fifth Circuit, however, modified the Board's Order

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[3] Mitzi Rye was *not* disciplined for violating this aspect of the rule.

to the extent that it had required absolute rescission of the no-solicitation rule. [App. pp. A(2) and (13)]. The Fifth Circuit modified the Order to allow employees, during their non-work time, to solicit in all break areas, specifically including the smoking area, restrooms, areas surrounding the water fountains, and the pathway to the main break room. [App. pp. A(2) and (13)]. In modifying the Board's Order, however, the Fifth Circuit specifically stated that:

> This opinion should not be construed so as to order Cooper to permit solicitation in actual working areas, i.e., in the immediate areas surrounding continuously operating machines. Further, we make clear that all employees involved in the solicitation are permitted to solicit in break areas only during their break times, whether informal or scheduled. *That is, both the solicitor and the solicitee must be on break.* (Emphasis added)

See App. pp. A(2, fn. 2)

Despite its ruling concerning the no-solicitation rule, however, the Fifth Circuit's decision with respect to Cooper's discharge of Mitzi Rye for violating the no-solicitation rule effectively prevents Cooper from enforcing the valid aspects of the no-solicitation rule. Specifically, Cooper had presented evidence (ignored without explanation by the Board, but acknowledged by the Fifth Circuit), that Rye had engaged in solicitation of fellow employees in work areas at times when either

she or the employee solicited should have been working. [App. pp. A(19) - (20)].

The Fifth Circuit nonetheless agreed with the Board's finding that Cooper could not lawfully discharge Rye for engaging in the very activity that the Fifth Circuit had specifically said Cooper could lawfully prohibit, stating:

> We agree with the Board that these conversations were only of a few second's duration and there was no evidence that any conversation resulted in or had the potential for disruption.

[App. p. A(20)].

REASONS FOR GRANTING THE WRIT OF CERTIORARI

A. The Board's *Daylin* Doctrine Impermissibly Extends The Act's Protection To Unprotected Activities

Forty-seven years ago, this Court stated, "Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours". *See Republic Aviation Corp. v. NLRB*, 324 U.S. 792, 89 L.Ed. 1372, 1379-80, f.n. 10 (1945). Two years before that, the National Labor Relations Board itself recognized this fundamental premise that "work time is for work" and that an employer is therefore entitled to expect employ-

ees to work when they are on work time. *See Peyton Packing Co.*, 49 NLRB 828, 843-44 (1943), *enf'd*, 142 F.2d 1009 (5th Cir. 1944), *cert. denied*, 323 U.S. 730 (1944).

Nevertheless, 27 years after the Supreme Court's decision in *Republic Aviation* and 29 years after its own decision in *Peyton Packing*, the NLRB departed from the fundamental doctrine that "working time is for work" and held that an employer may not lawfully discipline an employee who engages in the unprotected activity of engaging in union solicitation at a time when he or the employee solicited should be working, if the employer maintains an overly broad work rule that, on its face, could apply to protected activity. *See Daylin, Inc.*, 198 NLRB 281 (1972), *enf'd* on other grounds, 496 F.2d 484 (6th Cir. 1974). In *Daylin*, the Board ruled that if an employee is discharged for soliciting in violation of an unlawfully broad no-solicitation rule, the discharge also is unlawful unless the employer can affirmatively establish that the solicitation interfered with the employee's own work or that of other employees and that this, rather than violation of the rule, was the reason for discharge. The *Daylin* doctrine is applied by the Board even if the employee is not discharged for violating the over-broad or illegal aspects of the rule.

Indeed, this is exactly what the Board did in the case of Mitzi Rye, holding that even if she had engaged in work time solicitation, there was no showing by Cooper of impairment of production. *See* App. pp. A(88, fn. 33) and (A)89. Similarly, the Fifth Circuit adopted the *Daylin* reasoning, *sub silentio*, when, in determining whether to enforce the Board's order, it

stated, in discussing Rye's conversations with employees about the union on work time and in work areas, "these conversations were only of a few seconds' duration and there was no evidence that any conversation resulted in, or had the potential for, disruption". *See* App. p. A(20).

The *Daylin* doctrine which extends the protection of the National Labor Relations Act to employees who engage in union solicitation when he or she should be working has been Board law for 20 years. Cooper submits that the validity of the Board's *Daylin* doctrine raises a question of exceptional importance that has not, but should be, settled by this Court. This Court has never ruled on its validity, and the U.S. Courts of Appeals asked to rule on its validity have declined to do so.

Indeed, the U.S. Court of Appeals for the Sixth Circuit, in reviewing the Board's decision in *Daylin* itself, while declining to rule on the validity of the *Daylin* doctrine, observed in a footnote that it had serious concerns about the validity of the doctrine. *See NLRB v. Daylin Inc.*, 496 F.2d 484 at 489, fn. 3. ("This [the Daylin doctrine] of course, would have the effect of shifting the burden of proof as to the challenged discharge from the general counsel to the respondent. To assess the validity of the Board's theory, it will be necessary to decide the question of whether a no-solicitation rule that is over-broad on its face may,

nevertheless, be validly enforced against persons *engaging in unprotected activity*".)[4] (Emphasis added.)

Further, two of the five members of the Board who rendered the *Daylin* decision 20 years ago dissented from that part of the decision which has come to be known as the *Daylin* doctrine. As Member Kennedy stated, "The Board has long recognized that it is not improper for an employer to insist that 'working time is for work . . . employees are not engaged in protected activity when they neglect their work duties to engage in union solicitation'". 198 NLRB at 282. Similarly, Chairman Miller expressed fears that an order which required an employer to reinstate an employee for utilizing work time for engaging in unprotected activity, whatever its nature, violates Section 10(c) of the Act [29 U.S.C. §160(c)] which prohibits the Board from ordering reinstatement of any individuals who are "suspended or discharged for cause".[5]

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[4] The Sixth Circuit enforced the Board's Order in *Daylin* on the basis that the employer condoned other solicitations on work time and enforced the rule only against union solicitation. In this regard, it is critical to note that the ALJ and the Board found that Cooper had uniformly enforced its no-solicitation rule against all solicitation, union and non-union alike, and regardless of whether the solicitation had a disruptive effect on work. [*See* App. pp. A(66) - (67) and A(69) - (70)].

[5] Certain Courts of Appeal have cited with approval other aspects of the Board's decision in *Daylin*. *See, e.g., Restaurant Corp. of America v. NLRB*, 827 F.2d 795, 805 (DC Cir. 1987). With the exception of the instant case, Cooper's research has not revealed a single case where any U.S. Court of Appeals has either expressly or impliedly agreed with the Board that simply because an employer maintains an over-broad no-solicitation

Like the Sixth Circuit, the Fifth Circuit had in the past expressly declined to rule on the validity of the Board's *Daylin* doctrine. *See Custom Recovery Division of Keystone v. NLRB*, 597 F.2d 1041 at 1044, in which the court stated, "We need not and do not rule on the propriety of the *Daylin* doctrine, however", finding instead that the Company's no-solicitation rule was valid and therefore that the "Board's application of the *Daylin* doctrine in this case was unwarranted, and its finding of a §8(a)(1) violation is not supported by substantial evidence". 597 F.2d at 1045. Moreover, even though it was asked to rule on the validity of the *Daylin* doctrine in the instant case, the Fifth Circuit did not do so, but it adopted the doctrine *sub silentio* when it required Cooper to reinstate Mitzi Rye, even though it acknowledged that she had engaged in solicitation at times when she or others should have been working.

Cooper submits that the very reason this Court has said that employers are permitted to ban solicitation on work time is that employees who are engaged in union solicitation while they should be working are simply not engaged in activity protected by the National Labor Relations Act. Cooper submits that the Board's *Daylin* doctrine goes too far. It should be overturned as an impermissible infringement upon a company's right to operate its business. The validity of the *Daylin* doctrine should finally be squarely addressed by this Court in order to provide some certainty to employers as to whether they may lawfully discharge employees for

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rule, it is thereby prohibited from enforcing the rule against work-time solicitation which it could otherwise lawfully prohibit.

violating the legal aspects of an otherwise over-broad no-solicitation rule.

B. The Board Has No Authority To Order An Employer To Reinstate An Employee Who Was Discharged For Engaging In Work-Time Solicitation.

The Fifth Circuit, in its decision in the instant case, recognized the fundamental principle announced by this Court in *Republic Aviation* that "working time" is for work when it modified the Board's order concerning Cooper's no-solicitation rule to make it clear that employees are permitted to solicit only in break areas and only during their break times -- "That is, both the solicitor and the solicitee must be on break". [App. pp. A(2, fn. 2) and A(6)]. Yet the effect of the Fifth Circuit's decision enforcing the Board's order regarding Mitzi Rye is to say, on the one hand, that Cooper can lawfully promulgate a rule prohibiting employees from soliciting in work areas or on work time, and, on the other hand, that Cooper may not enforce the rule when the solicitation "neither resulted in, or had the potential for, disruption".

Employers violate Sections 8(a)(1) and (a)(3) of the National Labor Relations Act by discharging an employee only if they discharge the employee for engaging in activity protected by Section 7 of the Act. [*See* 29 U.S.C. §§158(a)(1) and (3); 29 U.S.C. §157]. Under Section 10(a) of the Act [29 U.S.C. §160(a)], the Board only has the authority to investigate and remedy violations of the

National Labor Relations Act. As previously pointed out, employers are permitted to ban solicitation on work time because employees who are engaged in solicitation while they should be working are simply not engaged in activity protected by Section 7 of the National Labor Relations Act (29 U.S.C. §157). Hence, a Board order that requires an employer to reinstate with back pay an employee who is engaged in unprotected activity exceeds the Board's authority under Section 10(a). Such an order further runs afoul of §10(c) of the Act [29 U.S.C. §160(c)] which expressly prohibits the Board from ordering the reinstatement of any individuals who are "suspended or discharged for cause."

Cooper submits that the question of whether an employee is engaged in unprotected activity by soliciting when he or she should be working is a question of exceptional importance in the area of federal labor law. It is a question that has not, but should be, addressed by this Court. To simultaneously hold, as the Fifth Circuit has done, that an employer may lawfully promulgate a rule prohibiting work-time solicitation, but that the employer may not enforce its rule against work-time solicitation under certain circumstances, places employers in an untenable position. If "work time is for work", then an employee who is soliciting when he or she should be working is not engaged in activity protected by the Act. Hence, an employer should be free to assess what it considers to be the appropriate quantum of discipline for an employee who engaged in work-time solicitation without scrutiny by the National Labor Relations Board which has statutory authority to

prohibit discrimination only if the discrimination is based upon activity protected by the Act.

CONCLUSION

Cooper submits that Member Kennedy and Chairman Miller and the Sixth Circuit were right when they questioned the validity of the *Daylin* doctrine. An employee like Mitzi Rye who solicits for a union when she or the employee solicited should be working is simply not engaged in protected activity. Accordingly, the quantum of discipline the employer chooses to impose on such an employee is not subject to review by the National Labor Relations Board.

Based on the foregoing, Cooper urges the Supreme Court to issue a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Fifth Circuit in the underlying matter.

Respectfully submitted,

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